United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7228, 7428

United States Court of Appeals

FOR THE SECOND CIRCUIT

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

—against—

GENERAL MOTORS CORPORATION and
E. I. DuPONT DeNEMOURS & COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

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November 30, 1977

Clerk
United States Circuit Court of
Appeals for the Second Circuit
Foley Square
New York, New York 10007

Attention: Mr. Brascia

Re: Gottesman, et al. v. General Motors,
et al. (77-7228, 7428)

Dear Sir:

In reviewing plaintiffs-appellants' brief (p. 33) and our brief we note that we did not mention, in the second paragraph of page 9 of our brief, that the successful plaintiff in Lewis was allowed attorneys' fees in a substantially reduced amount by Judge Weinfeld. We feel constrained to bring this fact to the Court's attention, as well as the fact that in Lewis payment of a fee was agreed upon by all parties.

We also note that three lines were dropped in printing from the first full paragraph on page 14 of our brief. That paragraph should read in full as follows:

> They overlook the fundamentally different nature of what was accomplished in Mills. It is not difficult to agree that the showing in Mills that certain information had been concealed and communication thereof to the stockholders of Electric Auto-Lite was of benefit to all of the stockholders. Here plaintiffs offer no more than an abstract proposition of law which, absent recovery by General Motors of damages, was

Clerk
United States Circuit Court of Appeals November 30, 1977

of no more benefit to the stockholders of General Motors than to the public at large.

We are enclosing herewith 10 additional copies of this letter for inclusion with the filed copies of our brief. We are also sending copies hereof to counsel for the other parties to this appeal and to Appellant Clendon H. Lee, who is appearing pro se.

Very truly yours,

Edward B Wallace
Edward B. Wallace

John J. Higgins
John J. Higgins

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-7228, 77-7428

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

—against—

GENERAL MOTORS CORPORATION and
E. I. DUPONT DENEMOURS & COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

The Issue Presented for Review

Whether this Court should reverse Judge Metzner's orders that plaintiffs, all of whose claims herein have been dismissed on the merits, and appellant Clendon H. Lee are not entitled to and should not be awarded attorneys' fees and expenses.*

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* This appeal and the applications to which it relates border on the frivolous. There is not the slightest basis in law or in the record for an award of attorneys' fees to these unsuccessful plaintiffs or to appellant Clendon H. Lee. Nevertheless, this brief, in conformity with the requirements of Rule 28 F.R.A.P., will address in order each of the points raised by plaintiffs and Lee, insofar as they relate to claims against General Motors Corporation.

Statement of the Case

Plaintiffs and appellant Clendon H. Lee appeal from Judge Metzner's denial of their applications to be awarded attorneys' fees and expenses for their fruitless efforts to obtain a judgment against E.I. duPont deNemours & Co. ("duPont") on behalf of General Motors Corporation ("General Motors"). This unsuccessful stockholders' derivative action was a consolidation of various suits commenced by certain individual stockholders of General Motors shortly after the Supreme Court decision in *United States* v. *E. I. duPont deNemours & Co., et al.*, 353 U.S. 586 (1957) (the "government case") in which it was held that ownership by duPont of stock in General Motors violated § 7 of the Clayton Act. In the Amended Consolidated Complaint herein (the "Complaint"), duPont and General Motors were charged with entering into a conspiracy in violation of §§1 and 2 of the Sherman Act, and the acquisition and ownership of GM stock by duPont was alleged to be a violation of § 7 of the Clayton Act.

Prior to the trial Judge Metzner had ruled that the judgment against duPont in the government case was not to be given *prima facie* effect pursuant to § 5 of the Clayton Act and that no private cause of action existed in favor of General Motors for damages caused it by duPont's violation of § 7 of that Act.

After a lengthy trial of the first and ninth claims, Judge Metzner entered final judgment dismissing those claims (279 F.Supp. 361). Plaintiffs appealed and this Court (414 F.2d 956) reversed on the issues of the weight to be given the judgment in the government case and of plaintiffs' right to assert a private claim for money damages under § 7 of the Clayton Act and remanded, but specifically refrained from passing on the merits of the action and noted:

"We are aware that the judgment is only *prima facie* evidence at best and that plaintiffs have the burden of showing not only antitrust law violation but injury as well." 414 F.2d at 965.

Proceeding on the record already developed, the parties again argued and briefed the case, and the Trial Court further assessed the evidence and accorded full weight to the decision of the Supreme Court. Final judgment was entered by again dismissing the first and ninth causes of action (310 F.Supp. 1257). Judge Metzner's decision was affirmed by this Court (436 F.2d 1205). Thereafter, the United States Supreme Court declined to review this Court's determination upon application (403 U.S. 911) and rehearing (404 U.S. 876).

There still remained for determination the other purported claims contained in the complaint. With regard to these claims duPont filed motions seeking summary judgment or dismissal. In order to reach a voluntary resolution of the remaining issues, duPont and General Motors made further documents available to plaintiffs. Because of the derivative nature of the claims, Rule 23.1 F.R. Civ.P. required that they be dismissed only with the approval of the court. Plaintiffs' counsel submitted to the court a report setting forth the conclusion that there was "no reasonable prospect of establishing any right to recover from duPont on behalf of General Motors in connection with any of the remaining claims". Pursuant to stipulation among the parties, Judge Metzner entered an order providing for notice to the stockholders of General Motors (A 39a) of a hearing for the purpose of determining whether the dismissal with prejudice of the consolidated action would be "fair, proper and reasonable and in the best interests of General Motors Corporation and its stockholders". The notice also stated that plaintiffs would make an applica-

tion for attorneys' fees and expenses and that defendants would oppose such application (A 41a-42a).

The hearing was held and Judge Metzner directed that judgment be entered (A 47a) dismissing the actions with prejudice and granting plaintiffs leave to apply within ninety days for an order "at the foot of the judgment" granting them reasonable counsel fees, disbursements and expenses of this action. Plaintiffs made application for an award of $1,000,000 in attorneys' fees and $345,059.94 in disbursements. General Motors and duPont opposed plaintiffs' application, and Judge Metzner denied the application (430 F.Supp. 1047). Plaintiffs filed notice of this appeal.*

ARGUMENT

Summary

The question before the Court is whether the plaintiffs, despite their failure to demonstrate any injury to General Motors or any violation of law beyond that found in the government case, or to obtain substantive relief of any description, may recover attorneys fees and expenses. There is no support for this unprecedented request. There is no statutory authority for such an award.** The record discloses neither benefit to General Motors or its stockholders nor bad faith on General Motors' part in the de-

* Thereafter, Clendon H. Lee, one of the many attorneys who appeared in this action on behalf of the various plaintiffs applied separately for $500,000 for his fee. Judge Metzner denied the Lee application. Lee filed a notice of appeal. By an order of this Court the two appeals were consolidated. Lee's arguments are substantially similar to those of plaintiffs' and will be addressed separately only when they differ in some material respect.

** Because of plaintiffs' failure on the merits, the attorneys' fees provision of § 4 of the Clayton Act are inapplicable.

fense of this action. Absent a showing of one of those factors, or a contractual provision for such an award, courts in the United States will not award attorneys' fees, even to a prevailing party.

POINT I

The American Rule Does Not Sanction the Award of Attorneys' Fees to Plaintiffs.

The American Rule has long strongly disfavored the shifting of attorneys' fees and expenses between parties to litigation.* An award of attorneys' fees may not be made even to a prevailing party except in certain narrow circumstances—where there is statutory authorization, where the party seeking fees has created a common fund or provided a common benefit, where the party from whom the fees are sought has acted in bad faith or deliberately disobeyed a court order or where they are provided for by contract between the parties. These exceptions to the American rule are strictly construed.

The record here is devoid of facts which would even suggest that plaintiffs' and Lee's applications fall within any one of the recognized exceptions. Plaintiffs' and Lee's briefs contain nothing which would contradict this conclusion.

To award attorneys' fees to plaintiffs and Lee would jettison the American rule and substitute for it the rule that any unsuccessful litigant may require his successful opponent to pay not only his own expenses but those of the losing party as well for the privilege of vindicating his actions. The absurdity of such a proposition is self-evident.

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* *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

Despite the contrary tenor of the American rule, plaintiffs advance as one of the grounds for the application that "the action was instituted and continued in good faith with court approval and based upon clear and reasonable grounds". First, it should be noted that, as was pointed out by Judge Metzner in his decision denying plaintiffs' application (A 122a), the "court approval" to which they refer did not amount to a finding that the action was in the best interests of General Motors or its stockholders, but merely a finding that the action was not dismissable on motion for plaintiffs' failure to make a demand on the stockholders. The language from this court's earlier opinion quoted by plaintiffs in their brief (p. 3) referred to the inevitability rather than the desirability of this litigation.

More fundamentally, plaintiffs claimed good faith in commencing and prosecuting this action is not something for which they should be rewarded by payment of attorneys' fees, but, rather the minimum that was required of them. Rule 11 F.R.Civ.P. provides that any pleading interposed other than in good faith may be stricken and places upon counsel for the pleading party the burden of assuring to the best of his ability that pleadings signed by him are true and properly interposed. In fact, if plaintiffs and their attorneys had not acted in good faith, defendants could have recovered their attorneys' fees from plaintiffs or from their attorneys.*

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* *Alyeska, supra, Hall* v. *Cole;* 412 U.S. 1 (1973); *Browning Debenture Holders' Committee, et al.* v. *DASA Corporation, et al.,* 560 F.2d 1078 (2d Cir. 1977).

POINT II

Plaintiffs Have Shown No Benefit to General Motors or Its Stockholders.

Plaintiffs contend that this case is within the exception which permits the award of attorneys' fees to one who, through litigation, confers a substantial benefit upon others who equitably should be required to share in the cost of establishing the benefit. Plaintiffs, however, have failed to show any benefit to General Motors or its stockholders arising from their commencement and unsuccessful prosecution of this action. Plaintiffs in their brief (pp. 27-28), set forth four ways in which they contend this action was of benefit to General Motors and its stockholders as follows: (1) by commencing the suit and stopping the statute of limitations from running on any claim which General Motors may have had against duPont; (2) by seeking the largest possible damages on behalf of General Motors; (3) by establishing the existence of a private cause of action for money damages under § 7 of the Clayton Act and (4) by securing from duPont an accounting with regard to its relation with General Motors, or, as they put it in their application to Judge Metzner, by "ventilating" those relations. None of such supposed benefits was, in fact, a benefit to General Motors or its shareholders.

As to the first supposed benefit, plaintiffs commencement of this action involved General Motors in over twenty years of litigation in the course of which endless hours of the time of the Corporation's responsible employes was unproductively consumed. This action came on the heels of the government case which had itself caused the Corporation considerable effort and expense, and in the course of which the Corporation thoroughly investigated the circum-

stances of duPont's relationship with General Motors and had concluded that there was no basis for a civil action against duPont. The commencement of litigation, even on behalf of a corporation, is not a benefit and cannot sustain an award of attorneys' fees.*

In *Academic Computer Systems,* Judge Pollack wrote:

> "The litigation was not successful and 'the mere institution of a stockholder's action does not guarantee that the plaintiff will be awarded attorney's fees . . .'" (198 F.R.D. at 202)

As to the second supposed benefit, it suffices to say that, while plaintiffs may have sought damages on General Motors' behalf "in as large an amount as possible", they recovered none. There was no benefit to General Motors or its shareholders in plaintiffs' claiming large but illusory damages.

Similarly, it is hard to conceive in what way plaintiffs' success in appealing Judge Metzner's ruling that no cause of action for money damages existed under § 7 of the Clayton Act conferred any benefit on the General Motors or its stockholders. While a benefit conferred need not be pecuniary to sustain an award of attorneys' fees,** it must be real and it must be substantial. The mere determination of a principle of law is not a benefit to the party on whose behalf allegedly it is made, unless some tangible advantage flows from it.***

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* *Alyeska, supra; Academic Computer Systems* v. *Yarmuth, et al.,* 71 F.R.D. 198 (S.D.N.Y. 1976).

** *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

*** *Lewis* v. *Arcara,* 74 Civ. 4627 (S.D.N.Y. Aug. 8, 1975); *Gottlieb* v. *Heyden Chemical Corp.,* 34 Del. Ch. 436, 105 A.2d 461 (1954).

The Delaware Supreme Court, for example, held in *Gottlieb, supra,* that plaintiffs' actions in causing an exposition of the law relating to stock options was not such a benefit as to justify an award of counsel fees even though it strengthened the corporation's position with regard to its own stock option plan when "every single feature of its option plan as originally proposed was eventually sustained." The court noted that clarification of the law is the aim of every judicial opinion on a legal question and while that result may indeed prove helpful to the bar, no principle of equity required that defendant corporation pay expenses of both parties "in the achievement of this species of public service."

Judge Weinfeld held in *Lewis, supra,* that even though plaintiffs established a legal principle (in respect of Section 16(b) of the Securities Exchange Act of 1934), their attorneys were not entitled to fees where there was no recovery and no benefit to the stockholders as such.

Plaintiffs mistakenly seek to rely on *Mills, supra,* as authority for the proposition that success with respect to a principle of law is sufficient to sustain an award of attorneys' fees. What was established by the *Mills* plaintiffs —and was held by the United States Supreme Court to justify an award of attorneys' fees to them—was not a principle of law, but that a proxy statement sent to shareholders in connection with the merger of another corporation into Electric Auto Lite contained false and misleading statements and omissions in violation of Section 14 of the Securities Exchange Act of 1934 and Rule 14a thereunder. Plaintiffs' efforts in *Mills,* brought to light not only that a violation had occurred, but also the true facts which defendants themselves had been under a duty to disclose to the shareholders of the corporation. In so doing they obtained partial summary judgment as to the issue of liability. The activities of the *Mills* plaintiffs conferred a benefit on the

corporation's stockholders whether or not they were subsequently able to show that any damages had been suffered as a result of the violation established.* Here, however, the violation itself was established in the government case and all relief which has been obtained was obtained therein.

The determination that a private cause of action exists under § 7 of the Clayton Act resulted in no recovery to General Motors or its stockholders. It did not result in the disclosure to the corporation or its stockholders of any information which had been wrongfully concealed. As Judge Metzner found, it did not result in any change in the business practices of either defendant (A 123a-124a). Therefore, it cannot be said to have resulted in any tangible benefit to General Motors or its stockholders. Even if, as plaintiffs in their brief (pp. 19-20) contend, the principle of law established was an important one, the benefit of its establishment accrued not to General Motors or its stockholders, but to the public generally. An award of attorneys' fees under the common benefit theory, however, requires that the benefit be conferred upon a limited, ascertainable class among whom the cost of obtaining the benefit may be fairly allocated.** Accordingly, the third

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* The district court in *Mills* subsequently found that damages had resulted from defendants' violation of the proxy rules and granted plaintiffs attorneys' fees in connection with their activities subsequent to the Supreme Court decision. The district court decision has been reversed by the United States Court of Appeals for the Seventh Circuit, 552 F.2d 1239 (7th Cir. 1977) which denied attorneys' fees on the ground that no further benefit had been rendered to the stockholders. Certiorari was denied by the United States Supreme Court on November 2, 1977 (Docket No. 77-331).

** *Alyeska, supra,* 421 U.S. at 265 n. 39; *Townsend* v. *Edelman,* 518 F.2d 116, 123 (7th Cir. 1975).

The law review articles cited by Plaintiffs (pp. 30-32) which suggest that a benefit to the public generally, rather than to a particular corporation or its shareholders is sufficient to support an award of attorneys' fees in a derivative action are without validity in light of the Supreme Court decision in *Alyeska, supra.* (See pp. 17-18 *infra.*)

supposed benefit which plaintiffs claim to have conferred by this litigation is also insufficient to support an award to them for atorneys' fees.

Plaintiffs' fourth supposed benefit—the accounting or ventilation theory—is deficient both legally and factually. The logic of a rule which would permit recovery of attorneys' fees by plaintiffs on such a theory would permit recovery by any unsuccessful derivative plaintiff who, in litigation, investigated the relations between a corporation on whose behalf the action is commenced and a defendant —officer, director or whatever—in a fiduciary relationship with the corporation, whether or not any breach of duty is discovered. No such rule of law exists.

In *Perrine* v. *Penroad Corporation,* 29 Del. Ch. 423, 51 A.2d 327 (1947) (Seitz, Vice-Chancellor), *aff'd* 30 Del. Ch. 517, 64 A.2d 412 (1948), stockholders who unsuccessfully opposed settlement of a derivative action were denied attorney fees. In rejecting plaintiffs' application, the Court stated:

> "Petitioners failed when the touchstone was success. Petitioners say in effect that their services in unsuccessfully opposing the settlement constituted a negative catalyst which prevented fraud and assured the court *that all facets of the settlement would be presented.*
>
> * * *
>
> Doubtless the petitioners aided the court in arriving at its conclusion, but that may be said of most attorneys representing losing causes. If refusal of compensation here can be said to discourage the proper policing of corporate affairs it must also be recognized that the rule which authorizes compensation only in the event of success strikes a balance between opposing interests." (Emphasis added) (51 A.2d at 334-335).

Similarly, the fourth supposed benefit is factually inadequate. Plaintiffs' counsel disregard the comprehensive investigations made by the management and counsel, including outside counsel, of General Motors following the filing of the Government case in 1948. Similarly, they disregard the years of investigation and discovery which took place during the Government suit, the Grand Jury investigation, the wide search throughout the files of duPont, General Motors and other companies, the many depositions and the evidence presented in the seven months of trial before the court in Chicago. To say that despite such an airing of the facts, that an accounting or ventilation is still necessary, is merely to say that *only* self-appointed counsel, who have located a stockholder to lend his name as nominal plaintiff, are fit to investigate and appraise whether the Corporation has been damaged. Such a novel contention is certainly incorrect.

The question of whether the General Motors management at all times acted "in the best interests of General Motors" was uppermost in both the investigation and the trial in the District Court in Chicago. The District Court held squarely against the government:

> "The evidence, both oral and documentary, does not establish, however, that there was any agreement between the two companies that required General Motors to buy all or any part of its requirements from duPont. Nor does the evidence establish that duPont dictated or controlled the purchasing policies and practices of General Motors or sought to dictate or control those policies and practices. In fact, the evidence shows that General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that duPont manufactured." (*U.S.* v. *duPont,* 126 F. Supp. 235, 276 (N.D. Ill. 1954), *rev'd,* 353 U.S. 586 (1957)).

Nothing in the Supreme Court's opinions contradicts this finding. The Supreme Court's finding of violation of § 7 was based on a determination that the stockholding created the *likelihood in the future* of possible restraints:

> ". . . The test of a violation of § 7 [of the Clayton Act] is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." (353 U.S. at 607).

The Supreme Court quarrelled, not with the District Court's finding of "30 years of nonrestraint", but with its conclusion that this history "'negatived any reasonable probability of such restraint' at the time of suit". In fact, the Supreme Court conceded that

> "all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including duPont's competitors". (353 U.S. at 607)

The lack of necessity for any accounting was underscored by the fact that plaintiffs, at trial and in response to duPont's motion for summary judgment on the remaining claims, found themselves unable to prove any unfair or overreaching behavior on the part of the defendants.

The cases cited by plaintiffs do not support the contention that the commencement and prosecution of this action were a benefit to General Motors or its stockholders. For instance, citing *Mills, supra,* plaintiffs state (p. 28):

> "Gottesman also established that the findings of the Supreme Court could be effectively used to establish such damages. In accomplishing this, Gottesman not only benefitted General Motors but served to benefit

all stockholders by vindicating the statutory policy for the enforcement of the antitrust laws (see *infra*, Point 1B). For such services, it is submitted plaintiffs were entitled to apply for an interim allowance (*Mills, infra*, p. 30)".

They overlook the fundamentally different nature of what was accomplished in *Mills*. It is not difficult to agree that the showing in *Mills* that certain information had been concealed and communication thereof to the stockholders of Electric Auto-Lite was of benefit to all of the stockholders of General Motors than to the public at large.

The additional cited authorities are also readily distinguishable. In *Saks* v. *Gamble*, 38 Del. Ch. 504, 154 A.2d 767 (1958), as in *Mills*, plaintiffs obtained disclosure of facts—regarding ownership of a subsidiary corporation—which corporate management had concealed from the stockholders.

In *Saks* v. *Gamble*, 38 Del. Ch. 504, 154 A.2d 767 (1958), as in *Mills*, plaintiffs obtained disclosure of facts—regarding ownership of a subsidiary corporation—which corporate management had concealed from the stockholders.

In *Fischman* v. *Wexler*, 309 F. Supp. 976 (D. Del. 1970), Judge Wright made it clear that he was permitting, reluctantly, the payment of attorneys' fees to plaintiff only because the defendant and not the corporation on whose behalf the action had been commenced had agreed, unlike here, to pay them as part of a settlement agreement and because there was no objection to the settlement. He explicitly stated that he was not allowing the attorneys' fees on the ground that plaintiff had conferred any benefit on the corporation or its shareholders and stated that the holding of *Mills* was not applicable to the facts before him.

In *Voege* v. *North American Rockwell Corp.*, (S.D.N.Y. 73 Civ. 685), as in *Mills*, plaintiffs uncovered arguably material information which had been omitted from a merger proxy statement sent to the shareholders of North American Rockwell Corporation, on whose behalf the action had been commenced. Moreover, the *Voege* plaintiffs obtained an agreement, as part of the settlement of the action, that such information would be disclosed in the future. Based on these benefits to the corporation's shareholders which he described as "corporate therapeutics", Judge Owen permitted an award of attorneys' fees, sharply reduced from the amount which had been sought and had been agreed to as part of the settlement. Here plaintiffs uncovered no wrongdoing and obtained no concessions for the future, and the award of attorneys' fees, far from being agreed to, is strenuously opposed.

In *Becker* v. *Martin*, (S.D.N.Y. Civ. 124-123), stockholders of Bates Manufacturing Company had sued the Windsor Company, claiming that Windsor had used its control of Bates to require Bates to buy an unprofitable factory from Windsor. After several years of litigation, Bates realized a substantial long-term profit on the transaction by selling the machinery in the factory, conducting its own operation in part of the factory, and leasing another part at a favorable rental.

The parties agreed that the plaintiffs would be unable to prove that Bates had suffered damage. On the other hand, Windsor agreed that the plaintiffs' attorneys had conducted an independent investigation that had substantial value to Bates. Therefore, *Windsor, not Bates,* agreed to pay plaintiffs' counsel a $25,000 fee in return for a release of all claims that Bates might have. In these circumstances, with no objection being raised to the settlement, Judge Metzner approved the settlement, but reduced the attorneys' fee award to $17,000.

Chemerinsky v. *Airfleets, et al.*, Civ. No. 1573 (D. Del. 1957) and *Allen* v. *Durning, et al.*, Civ. No. 630 (Del. Ch. 1954) are similar to *Becker* in that each involved an agreed, unopposed settlement which included payment of plaintiffs' attorneys fees.*

Kennedy v. *Emerald Coal & Coke Co.*, 27 Del. Ch. 55, 30 A.2d 269 (1943) had to do, not with an award of attorneys' fees but with the taxing of statutory costs. In *Schenectady Trust Co.* v. *Emmons*, 263 App. Div. 542, 33 N.Y.S.2d 688 (3d Dept. 1942) and the two New York cases which followed it** the award of attorneys' fees to unsuccessful plaintiffs or intervenors in trust accounting proceedings, was, as *Schenectady Trust* makes clear, based on statutory authority contained in New York Civil Practice Act § 1513. There is no statutory authority for plaintiffs' requests here. Thus, in each of the cases cited by plaintiffs the attorneys' fees were granted because the case fell within one of the recognized exceptions of the American rule. Each of the cases involved facts clearly distinguishable from those here which brought the case within the pertinent exception to the American rule. None of them offers any support for the motion that there has been a benefit to General Motors or its stockholders.

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* *Abrams* v. *Textile Realty Corp.*, 197 Misc. 25, 93 N.Y.S.2d 808 and 97 N.Y.S.2d 492 (Sup.Ct. 1959), cited in the brief of Clendon H. Lee (p. 5), has to do only with the question of whether a derivative plaintiff who obtains injunctive relief rather than money damages may be awarded attorneys' fees. Mr. Lee's efforts to demonstrate that the rule regarding attorneys' fees in diversity cases is different from that in other federal cases may be true, but is irrelevant. Neither plaintiffs nor Lee are entitled to attorneys' fees under any applicable state law.

** *Matter of Osborne*, 18 App. Div. 2d 973 (1st Dept. 1963); *Matter of Heller*, 10 Misc.2d 363, 115 N.Y.S.2d 343 (Sup.Ct. 1948).

POINT III

Plaintiffs May Not Recover Attorneys' Fees on the Ground That the Litigation Served to Vindicate the Statutory Purpose of the Antitrust Laws.

Plaintiffs contend that it is a separate ground for an award to them of attorneys' fees that the action served to vindicate the purpose of the antitrust laws—that they acted as private attorneys-general. While General Motors disputes plaintiffs' claim that this needless and unsuccessful litigation has served to vindicate the purpose of the antitrust laws, plaintiffs still would not be entitled to recover attorneys' fees on that ground even if their claim were true.*

In *Alyeska*, the United States Supreme Court made it clear that where the benefit of litigation is conferred upon the public at large and the sole benefit is furtherance of a statutory purpose, no attorneys' fees are recoverable.

In *Calnetics*, the Ninth Circuit made it clear that the principles enunciated in *Alyeska* apply to private actions under § 7 of the Clayton Act. Finally, plaintiffs' contention that the holding of *Alyeska* is not applicable to derivative suits was laid to rest by the Seventh Circuit in *Bailey*. This attempted distinction was an illogical one, for the premise upon which attorneys' fees are awarded to successful derivative plaintiffs is that their efforts benefit particular corporations and shareholders and not the public at large.

Kopet v. *Esquire Realty*, 523 F.2d 1005 (2d Cir. 1975), cited by plaintiffs is not in point. In *Kopet* attorneys' fees

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* *Alyeska, supra; Calnetics Corporation* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 694-5 (9th Cir. 1976); *cert. denied*, 429 U.S. 940 (1976); *Bailey* v. *Meister Brau*, 535 F.2d 982 (7th Cir. 1976).

were awarded because plaintiffs established that limited partnership shares had been sold in an improperly unregistered offering and that general partners of the limited partnership had concealed large loans from the partnership to themselves.

POINT IV

The Record Discloses No Bad Faith or Obdurate Conduct on the Part of General Motors.

In *Alyeska*, the United States Supreme Court stated that attorneys' fees may be awarded where "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . ." 421 U.S. at 258-9. Plaintiffs contend that by actively and successfully defending this action and by adopting what they describe as a "hard adversary position", General Motors was guilty of such conduct as would sustain an award of attorneys' fees to them. There is no basis for such a position. In order to bring this case within the bad faith exception, plaintiffs would have to have proved acts by General Motors equivalent to "intentional institution of an action which one knows to be fictitious and wholly without merit and which is done for the specific purpose of frustrating or harassing lawfully instituted legal procedures".* Obviously, in view of defendants' success, plaintiffs are unable to prove that General Motors has frustrated or harassed any lawfully instituted legal proceeding. With regard to this, Judge Metzner stated, "[t]he result of the litigation shows that [General Motors]

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* *Peltier* v. *Peltier*, 58 F.2d 1083, 1084 (1st Cir. 1977). Contrary to the impression which plaintiffs seek to create, in *International Union* v. *Peerless Pressed Metal Corp.*, 489 F.2d 768 (1st Cir. 1973) the party charged with intransigence was ultimately unsuccessful on the merits of its case. Nevertheless, no attorneys' fees were awarded.

properly resisted plaintiffs' claim" (A 123a).

Plaintiffs' contention in their brief (p. 39) that "no claims in *Gottesman* was made of any wrongdoing on the part of General Motors" is disingenuous. Paragraph 7 of the Complaint charged duPont's *domination* of General Motors' employees concerned with the purchasing of automotive fabrics and automotive finishes, and favoritism shown to duPont. It charged *surveillance* by duPont to the end that it would be favored and preference would be given to its products. It alleged *"lines of communication"* and *"friendship* or *self-interest"* of General Motors' officers and employees. It also alleged that officers, directors and employees of General Motors were motivated by the knowledge of possible penalty by dismissal, demotion or otherwise and of possible reward by promotion, depending upon their attitudes toward duPont's interests.

The final sentence of Paragraph No. 7 charged that "duPont's stock interest in General Motors exerted a *potent influence* on the affairs of General Motors, promoted the acts and transactions herein alleged and induced *General Motors* to participate therein." (Emphasis added.)

With no proof in the record to support such statements, plaintiffs have attempted throughout to depict the executives of General Motors and its operating divisions, including stylists, engineers, manufacturing personnel and purchasing agents, as mere puppets, disloyal to their employer and to themselves and bowing at duPont's behest.

All of these charges were made despite the finding of the United States Supreme Court, in the Government case, that all had acted "fairly and honorably". Events have proven the charges untrue. In these circumstances, even though no damages were sought directly from it, General

Motors properly felt compelled to defend the action actively to protect its own good name and the good names of its loyal employees.

There was, however, an even more compelling reason for General Motors active defense of this action. Subparagraph (e) of the Prayer for Relief sought an injunction against duPont, an important General Motors supplier, which, if granted, could not have failed to affect the purchasing policies and procedures of General Motors. The Amended Consolidated Complaint does not specify the kind of injunctive relief that the plaintiffs sought. Nevertheless, it is indicative that, as was noted in General Motors' brief in opposition to plaintiffs' motion to dismiss its answer, on August 31, 1966, by letter to General Motors' counsel, the plaintiffs' attorneys demanded that General Motors "institute the practice of sealed, competitive, deadline bidding without further delay".

In short, plaintiffs attacked the long established and successful purchasing policies and procedures of General Motors, as well as the integrity and fidelity to duty of its directors, officers and employees. General Motors had the right, indeed a duty to its stockholders, to resist this kind of attack.

Finally, the issue of the propriety of General Motor's active defense has already been adjudicated against Plaintiffs. At the opening of trial (tr. p. 6) plaintiffs moved to dismiss General Motors' answer on the ground that General Motors could not properly oppose an action brought on its behalf. Judge Metzner denied their motion (tr. p. 557), and they have never appealed that denial.

It follows that for plaintiffs to suggest that General Motors' active and successful defense of this action was

bad faith or "obdurate" conduct and that it entitles them to attorneys' fees is entirely without merit.

POINT V

Plaintiffs Are Not Entitled to Any Award of Attorneys' Fees in Connection With the Events Leading Up to the Dismissal of This Action.

After duPont had moved for summary judgment and dismissal of the remaining claims in *Gottesman*, plaintiffs' counsel agreed to review the prior proceedings, the evidence in the Government case, and additional material, some of which duPont had submitted in connection with its motions and some of which it and General Motors agreed to furnish voluntarily, to determine, before both sides had expended any more time and expense on the litigation, whether plaintiffs had any likelihood of prevailing on the remaining issues.

Since Rule 23.1 F.R. Civ. P. requires that derivative actions not be dismissed or discontinued without the approval of the court, Plaintiffs' Counsel agreed that if they determined that termination of the actions was in the best interests of all, they would report results of their review to Judge Metzner in order to obtain his approval to the dismissal of *Gottesman*. The result of their review is set forth in the agreed notice to stockholders:

> "The attorneys for the plaintiffs have filed affidavits setting forth that after detailed review of all past proceedings, the evidence available for use from the government case, and the additional data submitted by duPont and General Motors, they have reached the conclusion that there is no reasonable prospect of

establishing any right to recover from duPont on behalf of General Motors* in connection with any of the remaining claims in the *Gottesman* and *Schiff*** cases. Plaintiffs' attorneys, accordingly, are of the opinion that there is no foundation for opposition to the pending dispositive motions in the *Gottesman* case or successful prosecution of the *Schiff* case.

Plaintiffs have also indicated that in their opinion it would not be advisable for them to incur the substantial additional expenses that would be involved in the continuation of the litigation, which would probably be protracted over a period of years." (Emphasis added.) (A 41a)

The underscored language affords insight into plaintiffs' motives in preparing the report and seeking dismissal and discontinuance of the actions. It was the only way in which they—and their attorneys—could disentangle themselves from what was proving to be a costly and unprofitable enterprise. Thus, the review and report were highly beneficial to plaintiffs. The only benefit which General Motors, on the other hand, could be said to have derived from plaintiffs' activities in connection with the dismissal and discontinuance of the actions, is that plaintiffs ceased, after nearly twenty years, to subject the Corporation and its stockholders to the needless expense of this ill-conceived litigation. Far from being entitled to

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* The lack of a reasonable prospect of success is itself sufficient grounds for denying attorneys' fees upon dismissal of an action. *Academic Computer Systems, supra; Iroquois Industries, Inc.* v. *Lewis*, 318 A.2d 134 (Sup. Del. 1974).

** *Schiff* v. *General Motors*, was a separate action based on allegations similar to those contained in the Amended Consolidated Complaint. It was never consolidated with *Gottesman* and was stayed pending the outcome of the latter case. *Schiff* was voluntarily dismissed at the same time as *Gottesman*.

attorneys' fees because they did so, it is plaintiffs who would have been in bad faith if they had continued in the face of overwhelming evidence of the hopelessness of their case obdurately and unreasonably to prolong the litigation.

CONCLUSION

The orders of the District Court denying attorneys' fees, disbursements and expenses should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
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COUNTY OF NEW YORK)

GARY OLSEN, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to this action and resides at 161 Edgar Street, Weehawken, New Jersey 07087; that on September 14, 1977 he served two copies of the annexed Brief of Appellee General Motors Corporation upon each of:

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the addresses designated by said attorneys and party, by placing true copies of the said Brief enclosed in prepaid,

properly addressed envelopes in an official depository within the sole care and custody of the United States Postal Service.

Gary Olsen

GARY OLSEN

Sworn to before me this 17th day of November, 1977.

Notary Public

HENRY D. EDELMAN
Notary Public, State of New York
No. 4523758
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1978